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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's	)	**MM Docket No. 94-150**
Regulations Governing Attribution	)	
of Broadcast and Cable/MDS Interests	)	
	)	
Review of the Commission's	)	**MM Docket No. 92-51**
Regulations and Policies	)	
Affecting Investment	)	
in the Broadcast Industry	)	
	)	
Reexamination of the Commission's	)	**MM Docket No. 87-154**
Cross-Interest Policy	)	

To: The Commission

COMMENTS OF VIACOM INC.

Viacom Inc (Viacom) respectfully submits these Comments in response to the *Further Notice of Proposed Rule Making* ("*Further Notice*") in the above-captioned proceedings.

I. INTRODUCTION

By this *Further Notice*, the Commission solicits comments on certain aspects of the attribution rules in light of relaxation of its ownership rules, as mandated by the Telecommunications Act of 1996 ("1996 Act"). First, the Commission invites comment

on new attribution proposals which would attribute ownership to the holders of "equity-or-debt-plus" investments and to same market broadcasters brokering stations pursuant to local marketing agreements (LMAs). Additionally, the *Further Notice* elicits further comment on an earlier proposal to increase the voting stock benchmarks from 5% to 10% for active investors and from 10% to 20% for "passive investors." The Commission also inquires as to how changes in the attribution rules should be applied and enforced.

Subsidiaries of Viacom hold licenses of eleven television stations, ten of which are UHF stations and nine of which are UPN affiliates. The Viacom stations reach approximately 19% of the nation's homes (10% by measure of the "UHF discount").[1] Viacom is also the 50%-owner of UPN, a nascent television network co-owned by a subsidiary of Chris-Craft Industries, Inc.[2] Viacom, through its Paramount Pictures subsidiary and through its majority ownership of Spelling Entertainment Group, also produces network programs and produces and distributes syndicated television programs, and engages in the distribution of off-network television product.[3] Viacom is the indirect licensee of a station in the Hartford - New Haven - New Britain - Waterbury - New London market and, through an LMA, programs 27.5 hours per week of news and children's programming on another station in the market.

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[1] Those eleven stations are: WPSG(TV), Channel 59, Philadelphia, WSBK(TV), Channel 38, Boston, WBFS(TV), Channel 33, Miami; WDCA(TV), Channel 20, Washington, D.C.; WKBD(TV), Channel 50, Detroit; KTXH(TV), Channel 20, Houston; KTXA(TV), Channel 21, Dallas; WVIT(TV), Channel 30, Hartford; WTOG(TV), Channel 44, St. Petersburg; WUPA(TV), Channel 69, Atlanta; and KMOV(TV), Channel 4, St. Louis.

[2] The UPN network, through its affiliates, reaches 74% of the nation's households through primary affiliates and another 20% through secondary affiliates.

[3] In addition, Viacom wholly owns several cable television networks, including MTV: Music Television, M2, VH1, Nickelodeon/Nick at Nite, Nick at Nite's TV Land, Showtime, The Movie Channel, Flix, and co-owns the USA Network, Comedy Central, Sci-Fi Channel, All News Channel and Sundance Channel.

Given its diverse broadcast and program interests, Viacom has a vital interest in the Commission's proposed attribution, cross-ownership, and local and national ownership rules.[4] Attribution is most important because it delineates the framework for determining broadcast ownership and sets the benchmarks by which a mere business relationship rises to the level of a cognizable ownership interest. Viacom urges the Commission to adopt, with the modifications discussed herein, the attribution rules as proposed in the Further Notice.

Specifically, Viacom supports the Commission's "equity-or-debt-plus" approach but suggests that attribution arise at the 10% - not the 33% - investment level in those instances where an investor is not contractually precluded from influencing either (i) a station's program selections, (ii) its hiring of the personnel who make such selections, or (iii) a station's budget. Where participation in such matters is contractually precluded, the investment level should be capped somewhat higher, perhaps at 33% as the Commission proposes. Under this form of the equity-or-debt-plus approach, therefore, investments in or loans to a licensee would be attributable at different levels of financial participation depending upon whether an investor or creditor possesses the ability (contractual or otherwise) to participate in the programming and related operational functions of a licensed facility. In all instances, Viacom supports the Commission's proposal to attribute ownership where an entity has rights to vote 10% or more of a licensee's voting securities

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[4] Under separate cover, Viacom is also filing comments in connection with the companion rule making proceedings regarding local and national television ownership. *See Review of Commission's Regulations Governing Television Broadcasting* in MM Dockets No. 91-221, 87-8, FCC 96-438 and *Broadcasting Television National Ownership Rules* in MM Docket Nos. 96-222, 91-221 and 87-8, FCC 96-437.

II. "EQUITY OR DEBT PLUS"

A. The Current Attribution Rules Have Failed to Maintain a Level Playing Field for All Players in the Broadcast Arena.

In 1984, the Commission adopted the Report and Order in *Attribution of Ownership Interests*, 97 FCC 2d 997, 1005 (1984), a proceeding whose asserted central objective was to establish a benchmark which

> avoids unnecessary and possibly costly regulatory intervention by minimizing the attribution of non influential interests, yet which also identifies with reliable accuracy those interests that convey to their holders a realistic potential to affect the programming decisions of licensees

To that end, the Commission devised a set of bright-line rules which, it believed, would identify holders of a cognizable interest in broadcast stations and other media (e.g., daily newspapers, cable) implicated by the Commission's cross-ownership rules

Generally, those bright-line rules are embodied in the Notes to Section 73 3555 and 76.501 of the Commission's Rules, 47 C F R. §§73.3555 and 76.501. They provide that the only cognizable, *i.e.*, reportable, interests in a broadcast licensee are (1) 5% or greater corporate voting stock interests, (2) general partnership or "uninsulated" limited partnership interests, and (3) officer/ director positions. Under current Commission rules, all nonvoting interests, regardless of the amount of equity infusion and irrespective of the amount of monies loaned, are exempt from attribution. Attribution rules today even provide that a stockholder owning a 49%-percent *voting* interest in a licensee is exempt from attribution so long as the remaining 51%-voting interest is held by a single stockholder.

In determining that non-voting stock interests should be exempt from attribution, the Commission reasoned that such stock "by its specific nature precludes the means to influence or control the activities of the issuing corporation, and *this relationship is knowingly and intentionally entered into by the corporation and by the stockholder.*" *Id.* at 1020 (emphasis added). Thus, the Commission perceived that a stockholder's ownership of non-voting stock evidenced a constructive contractual agreement between the stockholder and licensee such that non-voting stock constituted a tacit limit on meaningful participation in the programming or other core operations of a licensee. In crafting the blanket exemption for all non-voting stock, however, the Commission did not contemplate that the non-voting stockholder and the licensee could, *and would*, enter into corollary understandings and agreements --network affiliations, stock subscription agreements, stockholders agreements, corporate articles and by-laws, loan agreements, option agreements, put/call agreements, or partnership or limited liability company agreements-- *requiring* or predicating the non-voting involvement on the *de facto* active participation of the non-voting stockholder in the licensee's operations.

Thus, while the attribution rules emanating from the 1984 proceeding, which are still in effect today, are indisputably bright-line in nature, they have failed to satisfy their asserted objective: to identify interests and relationships that confer a realistic potential to affect the programming and related core functions of a licensee. Indeed, as the Commission acknowledges in the *Further Notice*, FCC 96-436 at ¶18 and notes 27, 30, several national broadcast television networks, as well as group owners holding ownership interests in television networks, have acquired "complex and substantial financial interests" in broadcast television stations affiliating with those networks. *See, e.g., Roy M. Speer*, FCC 96-89 (released March 11, 1996), *clarified*, FCC 96-258 (released June 14, 1996) (1996), *petition for recon. pending*; Letter to Heritage Media, Inc. et al. from Roy Stewart, Chief, Mass Media Bureau, dated January 18, 1996 (FCC File Nos. BTCCT-

950911KF-KG and BALCT-950628KJ-KL); FCC File No. BALCT-950424KF (Group W/CBS Television Stations Partners) *Quincy D. Jones*, 11 FCC Rcd 2481 (1995), *BBC License Subsidiary L.P (KHON-TV et al.)*, 10 FCC Rcd 10968 (1995), *BBC License Subsidiary L.P. (WLUK-TV)*, 10 FCC Rcd 7926 (1995); *NBC, Inc.*, 6 FCC Rcd 4882 (1995). In each of these cases, the networks (or those with ownership interests in a network) held equity and/or debt interests constituting or exceeding one-third of the capitalization of the broadcast stations at issue. Yet, solely for the purposes of avoiding attribution, the investors in each case financed the stations, not in exchange for corresponding voting rights that might trigger the Commission's attribution threshold, but, instead, in exchange for contractual rights --through corollary written or unwritten agreements-- that permitted them the right among other things to participate in the programming and/or related core functions of the licensee. Indeed, by heavily financing television stations in return for nothing less than a *quid pro quo* for an affiliation, networks have been permitted to significantly extend their ownership and influence in television stations beyond their declared owned and operated (O&O) stations

Confronted with these network/licensee arrangements on an *ad hoc* basis, the Commission concluded in each case that the various discrete financial interests and programming relationships held by the networks were attributable neither under precedent nor under the bright-line rules set forth in Section 73 3555. It is now apparent, however, that to maintain the integrity of the underlying objectives of the attribution rules, the Commission must "evaluate as a whole the totality of [a party]'s myriad interlocking interests in and relationships to" a licensee. *BBC License Subsidiary L.P. (WLUK-TV)*, 10 FCC Rcd at ¶42.

With this as its objective, the *Further Notice* propounds the equity-or-debt-plus approach which is designed to treat as cognizable certain financial interests in and certain

other relationships with a television station licensee. This approach would be added to, but would not replace, the current attribution rules. Under the equity-or-debt-plus rule, the *Further Notice* proposes to attribute otherwise nonattributable debt or equity interests in a licensee where: (1) the interest holder is either a "program supplier" to the licensee or is a same-market broadcaster or other same-market media outlet subject to the broadcast cross ownership rules; and (2) the equity and/or debt held equals or exceeds 33% of a licensee's total capitalization.

B. The Commission Should Adopt a Stringent Form of the Equity-or-Debt-Plus Approach.

Viacom respectfully advocates that the Commission largely abandon its current attribution rules and adopt a new set of bright-line attribution tests whose centerpiece is a more stringent version of the equity-or-debt-plus approach proposed in the *Further Notice*.

Despite the asserted objective of attribution --to identify those relationships that meaningfully permit "significant influence" so as to be deemed attributable[5]-- the rules should not ignore the sundry contracts and relationships through which investors exert undue influence over those in whom they invest. To recognize and account for these relationships Viacom submits that an investor who holds 10% or more of the capitalization of a station in the form of equity and/or debt and who is not contractually prohibited from (i) participating in the programming, (ii) influencing the choice of personnel who make programming decisions, and (iii) participating in the adoption of budgets is, in fact, in a position to wield "significant influence" and should therefore have a cognizable interest. Viacom believes that an investment of even 10% of the capitalization of a station, when coupled with the ability to participate in a station's operations, particularly programming

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[5] *See Notice*, 10 FCC Rcd 3606 at ¶51.

decisions and the influences which bear on such decisions, conveys to the investor an amount of influence at least as significant as does an investment carrying with it only the power to vote a 10% interest.

Despite the Commission's objective of deeming cognizable all parties with significant influence over a licensee, the proposed 33% benchmark for the equity-or-debt-plus approach is much too liberal and would allow a network or other programmer (such as an LMA broker) to escape attribution even were it to hold a 32.99% interest in a station in every market in the nation and were to condition those investments on continued affiliation or programming subservience. As is the case today, such a rule would not only undermine ownership limits (even as they have been recently liberalized by Congress in the 1996 Act), but would also permit those networks willing to "push the envelope" to position themselves ahead of other networks who would abide by the intent, as well as the letter, of the rules.

The approach advocated by Viacom entails a two step evaluation to determine if attribution is appropriate. The first step requires a determination of whether an investment is accompanied by a written contract expressly prohibiting the investor's involvement in (i) selecting the programming, (ii) hiring personnel who make programming decisions and (iii) adopting the budgets of the licensee.[6]

The second step requires a determination of the magnitude of the financial investment and voting rights. If an investor is contractually precluded from participation in the identified programming-related operations, it could hold up to 10% of the voting

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[6] Where there is no contractual insulation, the investor is presumed to be a participant in programming and related station operations. That presumption could be rebutted by an evidentiary showing to the contrary or, in the case of investment coupled with the right to a board seat by a pledge of recusal on matters relating to programming and related core operational functions

power and/or up to 33% of the equity and/or debt of a licensee without triggering attribution. This would apply to all investors including "networks" (and "owners" of networks as discussed below) where the relevant television station is not an affiliate of the investing network. As an illustration, a group owner (even a group owner which also owns a network) could acquire a 32.99% interest in a station licensed to the same market as another station in the group, provided, however, that the investing broadcaster and the invested-in station execute an agreement expressly precluding all participation in the three relevant categories of station operation outlined above. These contractual prohibitions must preclude the investing broadcaster from linking its investment to a station's willingness to affiliate with its own network or to be time brokered. The investor cannot recommend, nominate or dictate the selection of employees who can influence the choice of programming and cannot suggest or approve station budgets. At most, such an investor would be permitted to participate in a narrow set of so-called "extraordinary" corporate actions necessary to help insure the integrity of its investment. Such actions for example, would include approval rights with respect to mergers and acquisitions, the incurrence of debt senior to the investment, and the sale of all or substantially all of a licensee's assets.[7]

An investor without the contractual insulations precluding participation in these matters could hold only up to 10% of the vote and/or 10% of the total capitalization of a licensee before being deemed cognizable. This limitation would per se, apply to all "networks" investing in a television station that is affiliated with the network and to all same-markets LMA brokers, except for the exemptions proposed by Viacom in its comments in the companion rule making on local ownership in MM Dockets 91-221 and 87-8.

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[7] As an example of permitted participation in extraordinary corporate actions, See NBC, Inc. 6 FCC Rcd 4882, 4883 n.2 (1991).

C. "LMA" and "Network" Need To Be Carefully Defined.

Viacom's approach would automatically subject both networks and same-market brokering stations under an LMA to the strict 10% vote and/or capitalization benchmark Stations investing in and brokering another station under an LMA are usually readily identifiable but what constitutes a "network" is not necessarily easily ascertainable. Indeed, in the *Further Notice*, the Commission invites comment as to how to define different classes of program suppliers who, depending upon their degree of programming activity may either be syndicators or networks.

Viacom believes that syndicators should be distinguished from both "networks" and LMA brokers so as not be subjected to the slower 10% of capitalization benchmark which would otherwise be applicable. Because the distinction between a network operation and the syndicated sale of programming is often a matter of degree, it is Viacom's view that a functional approach should be applied to the definition of a "network" in order to distinguish it from mere syndication.

A "network" should be defined as an entity engaging in program distribution of more than two consecutive hours of programming which is required to be broadcast by a licensee in pattern with other licensees (allowing for time zone differences) where such in-pattern requirements apply to television stations serving 75% of total U.S television households. In contrast, sales of programming to stations in a competitive bidding environment and which do not contemplate broadcast of the programs in an interrelated manner would not constitute "network distribution" and the distributor, therefore, is not then a "network." Accordingly, a 33% capitalization benchmark would apply to a program syndicator who extends equity or credit to a station so long as that syndicator

contractually commits to avoiding participation in the previously identified three core operations of the station.[8]

Viacom suggests that an LMA be defined as a right (evidenced by a formal contract or *de facto* actions) of one broadcaster to direct or participate in the programming decisions of another broadcaster with respect to more than 15% of that broadcaster's total weekly broadcast hours, averaged over a rolling six months. In this way producers and distributors of syndicated programming would not be encompassed within this definition.

To maintain the integrity of these rules Viacom urges the Commission to adopt a strict attribution standard for those who invest in and partially own or who are key to the operation of a "network," as defined above, so that investors, part-owners and key persons are also considered a "network" for purposes of the equity-or-debt-plus 10% standard. The ability and incentive to exert significant influence over a station's programming decisions for an investor, part owner or officer/director of a network is equivalent to that wielded by the network entity itself. Specifically, Viacom suggests that an entity or person who holds an interest at least 10% voting or whose investment in a network equals at least 10% of total capitalization of the network will be deemed a "network" for application of the rule. A key officer or director of a network, would also constitute a "network." Moreover, Viacom suggests that the investments in stations by an officer or director of a network be attributable not only to the individual, but presumptively to the network. The Commission then will have a rule in place to address

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[8] However, a company owning a network and a television program syndicator (such as: Viacom, with its UPN Network and Paramount Television ; News Corp. with its FOX Network and its Twentieth Television; Disney, with its ABC Network and Buena Vista; Warner Bros., with its WB Network and its Warner Bros.; or Westinghouse, with its CBS Network and Eyemark) could not evade the stricter 10% benchmark applicable to networks where the station in which it is investing and selling syndicated programming is also affiliated with its network.

those situations where it may be questionable as to whether the officer or director is acting on an individual basis or as a proxy of the network. Under a prescriptive rule, no ambiguous situations need arise.

To illustrate, a party who is an officer or director of a network or who holds an ownership interest totaling 10% of the network's capitalization would be attributable with ownership in a station if he or she invested in or loaned to that station 10% or more of its capitalization, provided that the station were an affiliate of the network in question. The station would be attributable not only to the investor but to the network for which the investor presumptively is acting as proxy. In this way network entities will be unable to circumvent the stricter attribution rule by employing alter egos as their proxies in financing affiliate television stations without incurring attribution.

All of the foregoing is warranted by experience, as cited in Section II A, above, in which the investors/creditors engaging in multiple other relationships with stations were all networks or entities owning portions of networks. Networks, whose very existence is predicated upon national exposure, are the entities most motivated --and, therefore, most likely-- to enter into complex financing and affiliation arrangements with television stations so as to actually exceed the national ownership limits. In short, networks, restricted under the national ownership rule from outright purchase of stations which place them in violation of the 35%-reach rule, are, by the nature of their businesses, disposed to enter into arrangements which impinge on the programming independence of the television stations in which they invest.

D. Transitional Application of the Equity-or-Debt-Plus Approach

For a period of nearly two years, the Commission has been attempting to resolve, on an *ad hoc* basis, the attribution status of various networks investing in individual stations or in group owners. In all of the cases cited above, the Commission expressly cautioned the parties that its approval of the transactions then before it were subject to the outcome of this rulemaking. The parties in those cases proceeded to consummate those transactions with full notice and knowledge of the potential consequences, including, if necessary, partial or whole divestiture of the stations Accordingly, should the Commission adopt its proposed equity-or-debt-plus standard or, as Viacom advocates, a more stringent version of that standard, the Commission should order that all transactions made subject to the new attribution rules be brought into compliance within a reasonable time (such as 18 months) of the release date of the order adopting the new attribution rules

Viacom suggests that it is imperative that all licensees report on their next annual Form 323 Ownership Report any "network" (as defined herein) with which it is affiliated or LMA broker who brokers the station and also holds 10% or more of its capitalization In so doing, the licensee should accompany the submission of its Ownership Report with copies of all documents and agreements governing the relationship [9] Then the Commission may ascertain the scope of participation of networks and brokers to determine whether further application of the attribution rule is warranted

[9] Any oral agreements must be reduced to writing and submitted in connection with the filing

E. LMAs

Consistency and logic require that broadcasters (other than networks) which participate in other broadcasters' programming and are involved in the core functions identified above should be measured by the same strict attribution standard which Viacom suggests be applied to "networks" and their proxies. Consequently, as discussed above, television broadcasters investing 10% or more of the capitalization of a station and who broker that station pursuant to an LMA should be attributed with ownership of the station. This would apply regardless of the fact that the brokered station may be in a different market than that of the brokering station. However, for two stations operating in the same market, Viacom suggests that a *per se* rule be adopted so that the mere fact of an intra-market LMA is sufficient to create a cognizable interest in the brokered station regardless of the fact of or level of financial investment. As discussed in Viacom's comments in the local ownership proceeding this per se attribution would adhere except in those instances where the brokered station affiliates with a new network, or is a failing or failed new station.

The issue of grandfathering existing LMAs is also addressed in Viacom's comments in a companion rule making related to local television ownership rules. See Viacom comments, *Second Further Notice of Proposed Rule Making* in MM Docket Nos. 91-221 and 87-8 (released November 7, 1996). In those comments, Viacom proposes that broadcasters with an LMA arrangement should be made to comply with the new attribution rules after the shorter of five years or the termination date of the current LMA term. At that time the Commission should evaluate whether the brokered station fits into one of the exempted classes, i.e., is affiliated with a new network or is, at the time of evaluation, a failed or failing station.

F. Application of the Stricter, Equity-or-Debt-Plus Approach Will Not Jeopardize the Availability of Capital to Broadcast Television Stations

In the *Further Notice*, -- FCC 96-436 at ¶21, the Commission expresses concern that a stricter attribution rule for networks will:

> disrupt[ ] the flow of capital to television stations to fund, among other things, the conversion to digital television, which we anticipate will be costly. We invite comment as to whether the "equity or debt plus" approach would significantly hinder networks or other telecommunications entities from helping stations to fund the conversion to digital television, and, if so, if this is a significant problem

The rules proposed herein are not designed and are not expected to hinder investment in TV stations. These rules constitute only a measure of attribution, not a prohibition or limit on the amount of investment to be made by broadcasters or programmers in other broadcasters. On the other hand, if a network or broadcaster is dissuaded from making an investment because attribution will result, it would constitute clear evidence that the reason for the investment would have in fact been to influence the programming and core operational aspects of an otherwise independent broadcaster, resulting in a diminution of diversity and increased industry concentration, and the propriety of applying these proposed attribution standards will be manifest.

Nevertheless, to help assuage any concern that potent rules, such as Viacom is here proposing, might divert investment which would have otherwise occurred, Viacom suggests that the "passive investor" voting rights benchmark for investment by insurance companies, pension funds and investment advisers be capped not at 20% which the *Further Notice* proposes but at the same 33% which Viacom endorses for the equity-or-debt-plus standard. A high attribution standard is appropriate because these passive investors do not pose the threat to diversity and concentration as do other investors whose investment purposes serve their own programming self-interest.

III. CONCLUSION

For the foregoing reasons, Viacom urges the Commission to adopt an equity-or-debt-plus attribution rule which recognizes that attributable interests should be deemed to arise depending not only on the level of investment but also on the level of influence wielded on programming decisions and functions related to the making of those decisions by a broadcast licensee. Where such influence exists, the attributable level of investment and of voting should be triggered at 10%. Where such influences do not exist, an attributable voting level of 10% (except for passive investors who may vote up to 33% of the securities of a licensee) and investment level of 33% is appropriate

Respectfully submitted

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